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No. 85-1440

In The

Supreme Court of the United States

October Term, 1985

JOHNNIE C. SPRIGGINS and
MARIA Y. SPRIGGINS,

Petitioners,

vs.

FIRST NATIONAL BANK OF LEA COUNTY,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Spriggins' Petition states the questions presented in a manner inconsistent with the facts and the opinion of the Court of Appeals. The following is a more accurate statement of the issue:

When a lawsuit is dismissed in accordance with the terms of a fully-executed settlement agreement, is the denial of a motion to set aside that dismissal, made one day short of one year after entry of the dismissal, an abuse of discretion?

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OPINIONS BELOW

The Memorandum Opinion and Order of the District Court, not reported, appears as Appendix A of the Petition. The Order and Judgment of the Court of Appeals for the Tenth Circuit, unreported as yet, appears as Appendix C of the Petition.

INTRODUCTION

There are three basic reasons for denying the writ. First, the Petition was not timely filed. Second, the opinion from which Petitioners seek this Court's relief does not deal with a subject the character of which falls within the purview of Rule 17, Rules of the Supreme Court. Third, the Petition lacks merit.

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REASONS FOR DENYING THE WRIT

POINT I:

The Petition for Certiorari was not timely filed.

The above-entitled cause was briefed and submitted for decision to the Tenth Circuit Court of Appeals on November 13, 1984. The Court of Appeals' Order and Judgment was rendered in an opinion filed on November 27, 1985. The Petition for Writ of Certiorari was not filed until Thursday, February 27, 1986, more than ninety days after the entry of the final opinion by the Court of Appeals. The period for applying for a Writ of Certiorari has not been extended by a Justice of this Court, pursuant to 28 U.S.C. Section 2101(c) and Rule 20, Rules of the Supreme Court.

Petitioners seek to come within the ninety-day limitation period by virtue of the denial of Petitioners' request for rehearing filed November 21, 1985. However, that request for rehearing was addressed to the Court of Appeals' opinion filed November 8, 1985. That opinion was withdrawn by the Court of Appeals on November 27,

1985, concurrently with the filing of its Order and Judgment on November 27, 1985. The Court of Appeals' Order denying the Request for rehearing, dated December 6, 1985, had nothing whatsoever to do with the opinion of the Court of Appeals filed November 27, 1985, and cannot toll the time for filing the Petition which ended Tuesday, February 25, 1986. Therefore, Petitioners' application for a Writ of Certiorari is out of time and should be denied. *See, Puget Sound Power & Light Co. v. County of King,* 264 U.S. 22 (1924); *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206 (1952); *see also, Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399 (1923).

POINT II:

The subject matter of the Petition for Certiorari does not come within Rule 17, Rules of the Supreme Court.

Petitioners seek to have this Court review a discretionary act of the District Court which denied Petitioners' motion for Rule 60(b) relief. Petitioners' motion to set aside the dismissal of their lawsuit pursuant to the provisions of a settlement agreement between the parties was filed one day short of the maximum one year allowed for relief under Rule 60(b) and did not deal with the merits of the underlying case. Instead, the relief sought by Plaintiffs' motion was to have the District Court set aside a dismissal of the underlying lawsuit. The dismissal had been entered pursuant to the provisions of a settlement agreement which had been fully executed, by all parties, more than one year prior to the filing of Petitioners' motion. It is, therefore, quite apparent that Petitioners do

not seek review of a decision which even approaches those which come within the purview of Rule 17, Rules of the Supreme Court.

In unanimously affirming the District Court's use of its discretionary powers in denying Petitioners' motion for Rule 60(b) relief, the Tenth Circuit Court of Appeals did not render a decision in conflict with the decision of any other Federal Court of Appeals on the same matter. Furthermore, contrary to Petitioners' specious assertion (Petition for Writ, p. 13), the Court of Appeals' decision in no way touches upon a Federal question. Rather, the only question and only issue subject to review was whether the District Court's denial of Petitioners' Rule 60(b) motion was an abuse of judicial discretion. Also, the Court of Appeals' opinion does not conflict with any state court decision nor has the Court of Appeals departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court so as to call for an exercise of this Court's power of supervision. *See,* Rule 17, Rules of the Supreme Court. Instead, the Court of Appeals' decision parallels and follows the decisions of other Federal Courts of Appeal on similar matters and in similar situations. *Zimmerman v. Quinn,* 744 F.2d 81 (10th Cir. 1984); *Pierce v. Cook & Co., Inc.,* 518 F.2d 720 (10th Cir. 1975), *cert. denied,* 423 U.S. 1079 (1976); *Morris v. Adams-Millis Corporation,* 758 F.2d 1352 (10th Cir. 1985); *Sadowski v. Bombardier, Ltd.,* 539 F.2d 615 (7th Cir. 1976); *Smith v. Widman Trucking & Excavating, Inc.,* 627 F.2d 792 (7th Cir. 1980); *Federal's, Inc. v. Edmonton Investment Co.,* 555 F.2d 577 (6th Cir. 1977).

POINT III:

The Petition for Certiorari is utterly devoid of merit.

The District Court carefully and thoroughly considered Petitioners' arguments and assertions, in their entirety, whether based on fact or fancy, and denied the Petitioners' motion for Rule 60(b) relief. *See,* Appendix A of the Petition for Certiorari. Thereafter, the Court of Appeals reviewed the decision of the District Court and unanimously concluded that the District Court had not abused its discretion by denying the relief sought. *See,* Appendix C to the Petition for Certiorari. As is adequately demonstrated by the opinion of the Federal District Court for the District of New Mexico and the unanimous opinion of the Tenth Circuit Court of Appeals affirming the District Court's denial of Petitioners' motion for Rule 60(b) relief, together with the cases cited therein (*see, e.g., Gilbert v. United States*, 479 F.2d 1267 (2d Cir. 1973); *Zimmerman, supra; Morris, supra; Sadowski, supra;* and *Smith, supra*), the Petition for Writ of Certiorari is utterly devoid of merit.

WHEREFORE, Respondent requests that this Court deny the Petition for Certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

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